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IN THE

Supreme Court of the United States

October Term, 1944

No. 532

THE UNITED STATES,

Petitioner,

v.

DAVID McD. SHEARER,

Respondent.

On Petition for Writ of Certiorari

MEMORANDUM FOR RESPONDENT OPPOSING PETITIONER'S MOTION TO USE PRINTED RECORD ON APPEAL FOR PURPOSE OF RULE 41

CLARENCE B. DES JARDINS,
Counsel for Respondent.

Cincinnati, Ohio,
October 16, 1944.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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Counsel for respondent respectfully opposes petitioner's motion to use printed record on appeal for purpose of Rule 41, filed on September 30, 1944, for the following reasons:

I. No printed record in connection with the appeal in this case (No. 424, this term) has been served on counsel for respondent, but it is understood, as the result of inquiries made at the Clerk's office, that a record is being printed in connection with said appeal.

II. The stipulation, in the appeal, No. 424, as to the printing of the record to be done prior to consideration of the issues raised by the jurisdictional statements, provides that it be limited to the body of the record transmitted from the court below, including the appeal papers, but excluding the 18 volumes of testimony and exhibits embodied in the transcript. Thus, such record, if and when printed, will not include any of the testimony or exhibits supporting the findings of fact of the Court of Claims.

III. If the petition for writ of certiorari herein is limited to the question of the sufficiency of the findings of fact to support the judgment entered below, in other words, if it is such a petition as would have been proper under the Act of February 13, 1925, c. 229, § 3, 43 Stat. 939 (28 U. S. C. 288), before its amendment by the Act of May 22, 1939, c. 140, 53 Stat. 752, the abbreviated record suggested by this motion would be proper, but respondent has not been served with a copy of the petition for writ of certiorari herein and has no way of telling whether it is so limited. The indications are that it is not.

IV. If the petition for writ of certiorari herein seeks to have this Court review the question of lack of substantial evidence to sustain a finding of fact by the court below, whether an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts, or whether there is a failure to make any finding of fact on a material issue, it is submitted that the pertinent evidence and exhibits should constitute a part of the printed record to be available for consideration by this Court in determining whether the writ of certiorari should be granted or denied. The course suggested by counsel for petitioner, in the motion, that is for each party to print, as an appendix to its brief, the testimony and exhibits pertinent to the questions raised by the petition, would impose upon respondent a

considerable printing cost, which he should not be called upon to pay.

V. The petitioner had an opportunity to reduce the amount of testimony and exhibits to be printed by proceeding under Rule 99(a) of the Rules of the Court of Claims of the United States. It did not see fit to do so, but requested a transcript, on the appeal, "to include all parts of the testimony filed in the cause and all exhibits save those which may be eliminated by agreement of counsel, or by order of the court on motion of appellant." A substantial number of exhibits were subsequently eliminated from the transcript by agreement of counsel.

Respectfully submitted,

CLARENCE B. DES JARDINS,
Counsel for Respondent.

Cincinnati, Ohio,
October 16, 1944.